COMMENTS

OF THE

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

ON

"Draft Title VI Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs (Draft Recipient Guidance) and Draft Revised Guidance for Investigating Title VI Administrative Complaints Challenging Permits (Draft Revised Investigation Guidance); Notice

65 Federal Register 39650

(June 27, 2000)

Submitted Electronically
to
U.S. EPA's Office of Civil Rights

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INTRODUCTION

The Illinois Environmental Protection Agency respectfully submits the comments below in response to the request of the U.S. EPA for comments on its draft guidance on Title VI published in the Federal Register on June 27, 2000 (65 FR 39650).

The Illinois Environmental Protection Agency is designated by Section 4 of the Illinois Environmental Protection Act, 415 ILC 5/1 et seq., as the agency responsible for the administration of the federal environmental statutes in the State of Illinois, including specific responsibility for the Clean Air Act, the Water Pollution Control Act, the Safe Drinking Water Act, the Solid Waste Disposal Act, the Resource Recovery Act, the Resource Conservation and Recovery Act, and the Comprehensive Environmental Response, Compensation, and Liability Act. Together these laws embody the environmental pollution control program of this nation. These comments express the views of the Illinois EPA on the administration of these federal laws in Illinois and how the proposed guidance documents would affect this important work.

The Illinois EPA conducts its business on behalf of the citizens of Illinois in a manner consistent with the principle of equal rights for all, which is embodied in both the U.S. and the Illinois constitutions. The Illinois EPA carries out its important responsibilities to protect the health, welfare and environment on behalf of all of the citizens of Illinois. These citizens are a diverse and varied group, including some of the largest groups of minority populations in the nation, including not only racial minorities, but a large and diverse population of citizens of different national origins.

Some of the comments that follow are critical of the proposed guidance that U.S. EPA has offered as a means of implementing Title VI of the federal Civil Rights Act. These criticisms do not stem from a disagreement with the principles and purposes of the Civil Rights Act and do not imply a lack of belief in, or commitment to, those principles and purposes. The comments are intended to lead to a more effective program to assess and protect those rights.

The Illinois EPA provided extensive comments on "U.S. EPA's Interim Guidance for Investigating Title VI Administrative Complaints Challenging Permits" issued by U.S. EPA in 1998. When finalized, one of the proposed draft guidance documents which is the subject of these comments is intended to replace the Interim Guidance. The Illinois EPA is pleased that the U.S. EPA has addressed some of the issues raised in these and the many other comments submitted in response to the Interim Guidance. However, many important issues and concerns raised by the Illinois EPA have either not been addressed or, in the view of the Illinois EPA, have not been adequately addressed. In the comments that follow, Illinois EPA will reiterate its issues and concerns regarding those areas in the draft guidance and comment on some significant changes that have been made to, and address some of the new areas contained in, the draft guidance.

The Illinois EPA has participated in discussions and development of separate comments being submitted by the Environmental Council of States (ECOS), the national organization of state environmental agency directors. The Illinois EPA expresses support for those comments made by ECOS and also reiterates and adopts them as its own. This will help prevent unnecessary repetition of the same comments.

COMMENT 1:

The program to implement Title VI recommended in U.S. EPA's draft guidance simply cannot be made to work within the context of an environmental permitting program. There are at least three reasons for this. First, the draft Title VI guidance is so devoid of effective administrative standards and parameters that no permitting authority can know how to meet the requirements of Title VI under this guidance. Second, it requires the use of scientific tools that have not been developed, the application of complex integrative methodologies that have either not been developed or do not enjoy general acceptance within the scientific community, and the use of comprehensive and accurate data that are not available. Third, the guidance requires decisions that are beyond the expertise, scope and authority of permitting authorities to make. This conclusion is convincingly demonstrated by the fact that U.S. EPA itself has been unable or unwilling to incorporate any of this draft guidance into its own federal permitting programs, the same programs in which the States would have to apply the guidance.

This is a general summarizing comment, intended to provide an overall assessment of the effect of the draft guidance. Some of the individual reasons mentioned for why the guidance is unworkable will be discussed separately below. However, it is important that U.S. EPA understand that the State permitting authorities that would be called upon to carry out these efforts do not believe that the program can work. It is, at this time, too undefined, too complex and simply infeasible. For example, the ozone control program that the Clean Air Act has addressed over the last 30 years through three major Congressional revisions, while itself a complex, expensive and technically challenging endeavor, is less difficult in each of these areas than the Title VI program proposed by U.S. EPA in its guidance. Yet, the draft guidance would require immediate implementation of a comprehensive Title VI program that goes beyond all federal environmental statutes in its environmental objectives and policies. This is not a statement of objection to the goals of Title VI, but a simple statement of fact that U.S. EPA itself knows to be true.

COMMENT 2:

The draft guidance does not enable a state to conduct an acceptable adverse disparate impact analysis. In fact, for nearly every step of the disparate impact

analysis, the guidance does not provide an adequate basis to understand how to perform that step of the analysis.

The adverse disparate impact analysis is the critical element in the draft guidance. For every instance where a Title VI issue must be evaluated, there must ultimately be an analysis that indicates whether there is any reason to be concerned about a significant disparate impact. The elements or steps of this process are each complex and important. The result of the uncertainty that permeates the guidance is that a permitting authority has no incentive to conduct a disparate impact analysis since the inputs to any study, no matter how thorough or complete, could be selected on a different, and no less acceptable basis, which inputs could produce a different result.

A step-by-step review of the elements of an analysis, together with what the guidance provides or fails to provide for each step, is necessary to appreciate the full extent of the uncertainty that the guidance creates for permitting authorities attempting to comply with Title VI.

1) Identify the affected population: Based on the discussion in the guidance, this step "depend[s] on the allegations and facts in the case". According to the draft guidance, "[v]arious affected populations may be identified". The affected population can be categorized, according to the guidance, in a number of different ways, by likely risk, by measure of impact above a threshold of adversity, by sources or by pathways. The guidance also states that the area for the affected population can be "irregularly shaped due to environmental factors or other conditions" and that "the affected population may or may not include those people with residences in closest proximity to a source." (65 FR 39681) These statements provide no criteria for a permitting authority to identify the affected population. Indeed, the identification of an affected population is little more than a random choice among many competing sets of criteria.

2) Identify the comparison population: The draft guidance states that OCR "would generally expect to draw relevant comparison populations from those who live within a reference area," giving as possible reference areas the recipient's jurisdiction, a political jurisdiction or an area defined by environmental criteria. (Obviously, only one of these has an environmental basis, though this is presumably an environmental analysis.) The guidance also indicates that an entire State could be the reference area, and that the comparison population could be either the general population for the reference area or the non-affected population for the reference area. The guidance also states that the assessment is expected to include one of six different comparisons of demographic characteristics. (65 FR 39681- 39662) Again, the statements provide no discernible basis for choosing among various and competing sets of criteria. The guidance would not even allow the permitting authority any measure of certainty if it elected to use all three of these different possible reference areas and create three separate sets of comparison populations since, within each listed category, there are numerous undefined choices that could be made which would result in different comparison populations.

3) Determining the pollutants to evaluate: For a single pollutant, this may be a simple matter. However, where a source or group of sources have multiple pollutants, a recipient does not know from the guidance which pollutants to evaluate, whether to look

at each pollutant separately, whether to add risks from separate analyses, or whether to look at synergistic effects. As U.S. EPA knows, the scientific tools to analyze synergistic effects are not well developed, nor are they generally accepted.

4) Pathways of the pollutants of concern: The expectations for this step are not defined and the complexities are ignored. For example, if an air permit is the subject of a complaint, should other non-air pathways of exposure be considered, even if the permit has no other relation to such pathways? If the permit is solely for a source of particulate matter, should other pollutants be examined? Should the toxic properties of the particulate matter be considered? If so, which toxics should be considered? No answers are provided in the guidance for these questions or for the analogous questions that arise for land or water permits.

5) Disparate impact analysis methodology: The draft guidance does not provide a list of acceptable methodologies or even a single acceptable methodology to use to perform a disparate impact analysis. This is one of the areas where the ECOS Comments make the point that there is no assurance in the draft guidance that there will be "sound peer-reviewed science." The Illinois EPA shares this concern.

The draft guidance acknowledges this problem, stating "[t]hese analytical tools have limitations given the state of the sciences in assessing risks from multiple stressors and exposure pathways." (65 FR 39660) However, the guidance attempts to assert that some tools are available. "Although there is no single place to obtain access to data sources and tools needed to address these concerns, and some are incomplete or still being developed, major assessment tools and data are available." (65 FR 39659) However, as this statement itself indicates, U.S. EPA cannot conclude that these ("major") tools are sufficient to do the job.

> 6) Determination of whether an impact is significant: The guidance does provide some help on this issue. However, as seemingly happens at every important point in the guidance, U.S. EPA concludes that this determination would be decided on a case-by-case basis.

In summary, U.S. EPA is unable or unwilling to provide criteria that would enable a recipient to know how to conduct a disparate impact analysis or how to make decisions on which elements are needed for an analysis to be accepted. This is a major issue for recipients, particularly in light of the cost of conducting these studies. (U.S. EPA's own study in Shintech cost several hundred thousand dollars and ultimately was not accepted by either the complainant or the permitting authority as adequate.) It is this unwillingness to provide criteria -- even on an interim basis -- that forces U.S. EPA to develop the concept of "Due Weight" that will be given to a recipient's analysis instead of looking to the application of set criteria known prior to analysis.

COMMENT 3:

The U.S. EPA should provide funding for the Title VI activities that this guidance would ask of state permitting programs

In a very real sense, the importance attributed to any program can be judged by the size of its budget. From this perspective, one would be forced to conclude that U.S. EPA is not serious about establishing an effective Title VI program.

U.S. EPA is recommending that recipients undertake programs and perform Title VI analyses of great breadth and unprecedented complexity. U.S. EPA knows that its recommendations for Title VI are beyond its own expertise as well as that of State permitting authorities; in certain aspects they are also beyond the available science as well. If recipients are forced to proceed by this guidance, it would require an enormous amount of resources. At the same time, for its own Office of Civil Rights (OCR), U.S. EPA expects complete *de novo* investigations of virtually every complaint put to paper, including the performance of complex analyses that are well beyond available budget and staffing levels of OCR. This same office has only been able to complete one investigation carried through to decision in the last five years.

U.S. EPA has provided no additional funding for Title VI activities by recipients of its program funds, although the cost of a comprehensive program of the type it recommends is substantial. U.S. EPA also knows that the cost of a single, thorough Title VI analysis, if one could be done in a manner consistent with its draft guidance, would greatly exceed – probably by several orders of magnitude - the cost to a state permitting authority to act on that permit consistent with past practice over the last decade on U.S. EPA's behalf.

It is also important to realize that U.S. EPA's guidance would require the use of methodologies that are currently not available and that must be developed by U.S. EPA. There is no scientific consensus on the cumulative risk and assessment tools that would be required. Individual states cannot effectively develop these tools nor would it be prudent to try. Providing these tools will require a substantial budgetary commitment by U.S. EPA. In the absence of a corresponding fiscal commitment, proceeding with this draft guidance will prove hollow and ineffective.

COMMENT 4:

The Illinois EPA agrees with ECOS that the draft guidance effectively creates requirements for state permitting authorities that will be extremely costly to implement.

The draft guidance represents yet another unfunded federal mandate to state and local governments. One of the characteristics of an unfunded mandate is that they represent the federal government efforts to impose its policy decisions onto lower levels of government without considering all of the implications their policy dictates, especially the fiscal implications. This guidance will force state and local permitting authorities to

investigate whether or not the issuance of a new permit, or the renewal of an existing permit, will result in an added burden to a minority or low-income community. In order to do this, the draft guidance will require state and local permitting authorities to expend substantial amounts of money and administrative resources in order to meet this new federal mandate.

Furthermore, such an unfunded mandate represents U.S. EPA's attempt to impose its regulatory and policy objectives on state and local authorities without ever assuming either the risks or the responsibilities of these objectives. The draft guidance fails to acknowledge or address the disruption it will visit upon permitting programs.

There is the very real possibility that even if a permitting authority did seek to incorporate environmental justice principles into its permit review process, a complainant could still bring a Title VI administrative complaint which challenged the issuance of a permit on environmental justice or Title VI grounds. Due to the vagaries of the complaint process, a permitting authority is likely to have to expend additional resources trying to defend issuance of a permit, even after having incorporated such principles into its permitting process.

The draft guidance is also an unfunded mandate to state and local governments because it imposes potentially expensive disparate impact review of all permits. There is no indication in the draft guidance that U.S. EPA has engaged in any meaningful consideration of these additional costs.

COMMENT 5:

It is improper for U.S. EPA to impose requirements on state and local governments that it cannot and has not carried out in its own permit programs.

As a matter of law and policy, it is improper for U.S. EPA to require states to both determine and impose requirements upon the federal permit programs administered by state agencies where U.S. EPA has not addressed these requirements in its own programs. It is especially inappropriate to do this through an after-the-fact review of a state's efforts. All of these federal permit programs operate under U.S. EPA promulgated rules delineating permit standards and requirements; however, U.S. EPA has not amended its own rules to incorporate Title VI requirements. At the same time, U.S. EPA claims a rulemaking is not required for the Title VI elements of the programs contained in this draft guidance.

Such a result would be patently unfair to the state and local authorities who are partners with U.S. EPA in the administration and enforcement of this nation's body of federal environmental statutes. If U.S. EPA is intent upon implementing this guidance, it should make clear how it intends to hold itself accountable to the same standards of investigation review that it now proposes for review of state and local permitting decisions.

COMMENT 6:

The guidance would impose on state, regional or local environmental agencies a level of social and economic planning that they do not have the authority or ability to determine or implement.

The environmental permitting systems of the states should be "loaded" with the task of resolving a myriad of economic development and social issues of which the environmental impact issues are often only a small part. It would also be especially short-sighted to resolve these issues based solely on environmental considerations.

The business and economic development disparate impacts that may result from the implementation of this guidance may have far greater aggregate negative impacts on the health and welfare of a minority community than the environmental impacts. Failure to consider the negative economic and social impacts in making discrimination decisions, or effectively excluding such considerations from the decision making process, is likely to result in unintended consequences that will adversely redound on minority communities in this and other states.

COMMENT 7:

A serious and complex policy matter such as Environmental Justice Policy should be established through a comprehensive set of regulations and should not be developed through a complaint-resolution process.

Developing a policy through a complaint-resolution process creates a policy only by defining what cannot be done, rather than by what should be done. In effect, it constitutes a decision NOT to have a policy. The applicability of any given decision is unclear, as it is not necessarily applicable to the next set of facts.

More importantly, no one can in good faith attempt to comply with an undefined and unwritten policy, particularly one with such broad and far-reaching implications or one with such tremendous social forces at issue; including business development, economic growth, etc.

COMMENT 8:

As a policy matter, U.S. EPA's guidance could have the likely result of creating economic development *injustice* for minority communities.

The guidance could have the unfortunate result of prohibiting economic growth in order to prohibit disparate impacts that may be insignificant to the health of the minority citizens in a community. U.S. EPA's policy could operate to prohibit economic development in a minority community.

The guidance also fails to recognize that some economically disadvantaged or minority communities may, in fact, actually want to have industry, even locally undesirable land uses (LULUS), sited within their communities because they represent prospects for economic development. U.S. EPA implementation of the Title VI policy should not expend its resources in a way that may potentially deny such communities a viable alternative for economic development. Rather, U.S. EPA's efforts to promote environmental justice would be better advanced if it provided economically disadvantaged or minority communities with the resources required to negotiate the best possible deal for itself when considering the siting of LULUs within their communities.

The guidance apparently seeks to create a degree of equity in the siting of industry that, given our economic and political system, can never be realized through the permitting process. Even assuming that there is, at present, an unequal distribution of LULUs in either poorer or minority communities, government cannot mandate a equitable pattern of distribution of these types of facilities. The simple reason for this is that larger economic and social forces will prevent it. Thus, as a consequence of market forces, the people who live in communities which host LULUs will tend to be those who are financially less well off and have less mobility.

COMMENT 9:

There is no "state action," the effect of which is to create discriminatory effects, in the context of the consistent application of a nondiscriminatory permitting program. Therefore, there is no legally valid Title VI challenge.

The discriminatory "action" from which alleged discriminatory effects flow is the location of polluting activities by private parties (excluding an insignificant number of sources owned or operated by a governmental entity or sited through a state or regional siting process). Neither the State of Illinois nor the Illinois EPA (or, for that matter, most other states and their environmental agencies) select the site for any polluting activity. The location of these activities is the result of multiple, complex factors. The guidance, in practical application, ignores these basic elements in the political and economic structure:

- absent land use planning and zoning regulations justified under a state's police powers, market forces (including land costs, taxing structure, infrastructure, and environmental regulations) determine the location of industry;

- industry, especially heavy industry, tend to locate together in urban areas to ensure a sufficient workforce and to achieve economies in infrastructure necessary to serve these operations;

- cities, counties and other units of local government evince a desire to keep industry together through land use planning and zoning, including the formation of industrial parks and enterprise zones; and

° current *Brownfields* public policy initiatives support keeping industrial sources together.

The guidance, by assuming that the correlation of minority communities near heavily industrialized areas implies causation; i.e., polluting facilities locate in minority areas rather than minorities locate in industrialized areas, is faulty. If other factors such as zoning laws, market forces or the longstanding policy and practice of grouping industrial sources together have created areas of high air emissions (as they have throughout the nation), individual sources should not suddenly be denied their ability to conduct their business simply because their permit is the next one up for issuance or renewal, particularly when no action would be required in the absence of a new permit application. This is not policy, but an abdication of policy-making.

Conclusion

The Illinois EPA shares the conclusion of ECOS that U.S. EPA should substantially revise the substance of the guidance documents prior to issuing either document in final form. The Illinois EPA also believes that any final action on these should be done through a formal rulemaking in accordance with federal law. The reasons for these conclusions are stated above or in ECOS Comments referenced above.

Respectfully submitted,

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